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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ROBERT M. WOHLFARTH,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 641 prohibits the unauthorized disclosure of intangible information that merely relates to a governmental interest.

2. Whether law enforcement officers may knowingly monitor privileged conversations absent extrinsic evidence adequate to support a good faith belief that the participants are together involved in criminal activity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert M. Wohlfarth petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The judgment of the court of appeals is reported at 985 F.2d 554 (table). The court ordered that its opinion (App. 1) not be published.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1993. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 641 provides in pertinent part:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof;
>
> * * *
>
> Shall be fined . . . or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined . . . or imprisoned not more than one year, or both.

18 U.S.C. § 2517(4) provides in pertinent part:

(4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

INTRODUCTION AND STATEMENT OF THE CASE

This case raises important issues relating to the government's ability to criminalize the disclosure of intangible information pursuant to 18 U.S.C. § 641. The decision below permits the government to prohibit the disclosure of intangible information that merely relates to a governmental interest, even if the government holds no property interest in that information. Nothing in the statute's language or history, or in this Court's decisions, justifies that result.

The decision below betrays the extent to which the lower courts have reached diametrically opposed interpretations of Section 641 since this Court last addressed the statute in *Morissette v. United States*, 342 U.S. 246 (1952). Review by this Court is necessary to impose uniformity on the divergent interpretations articulated by the lower courts.[1]

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[1]Petitioner is aware that this Court recently denied certiorari in a case that related to Section 641. *See United States v. McAusland* , 979 F.2d 970 (4th Cir. 1992), *cert. denied*, ___ U.S. ___ (1993). In *McAusland*, the defendants were convicted of mail fraud as well as theft of government property. In addition, the

Factual Background. In 1986, Robert Wohlfarth was Assistant Counsel at the Navy's Strategic Systems Program Office ("SSP"). SSP was responsible for the construction of the Trident missile. Wohlfarth had worked for the Navy for twenty-eight years, had repeatedly won commendations from his superiors, and was within a year of being named the top patent counsel in the entire Navy. He also was within two years of full retirement. Wohlfarth had never been the subject of any employment discipline or inquiry.

In 1986, SSP issued a Request for Proposal ("RFP") to contractors seeking to build a device known as a 10-PIGA. The 10-PIGA is a type of gyroscope and is a component in the Trident missile guidance system. Following the issuance of the RFP, Wohlfarth had no involvement in the procurement process. His only involvement prior to that time was to review the Navy's requirements and make a fairly ministerial recommendation of which patent clauses should be included in the RFP.

The RFP was issued on August 22, 1986. SSP received bid proposals from Ferrante, Litton, Bendix, Northrop, and Rockwell on November 3, 1986. After

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"property" the defendants were convicted of stealing were documents marked procurement sensitive. Here there was no evidence that Petitioner disclosed anything other than the information that he may have heard in the hallways of the government building in which he worked. Furthermore, the information was not labeled sensitive in any fashion.

the bids were channeled through various review committees, the Contract Award Review Panel ("CARP") submitted a report to the source selection authority on December 4, 1986 recommending that Litton be awarded the 10-PIGA procurement. Litton's bid price was $22,097,000. Northrop's bid price was $36,634,000. On or before December 5, 1986, the source selection authority formally selected Litton as the winner of the procurement.

The government alleged that on or about December 4, 1986, Wohlfarth disclosed information relating to the 10-PIGA procurement to one of the contractors bidding for the procurement. The indictment did not identify the particular information that Wohlfarth allegedly disclosed. SSP and Litton signed the procurement contract on December 9, 1986.

In early 1987, the government launched an investigation of William Parkin, a consultant to a variety of well-known defense contractors. The government tapped Parkin's business phones. In the course of its wiretap, the government stumbled upon conversations between Wohlfarth and his wife, Sheila, who was Parkin's secretary. The government monitored the Wohlfarths' conversations even though the government knew the conversations were privileged and even though the government had no evidence that the Wohlfarths were together involved in illegal activity. During the course of their wiretap of Parkin's business phone, government agents overheard conversations between the Wohlfarths that allegedly implicated

Petitioner in disclosing information relating to the 10-PIGA procurement to Parkin. Following the investigation, the government indicted Wohlfarth.

District Court Proceedings. Wohlfarth was named in a four count indictment. Count I charged conspiracy to defraud the United States (18 U.S.C. § 371). Count II charged Wohlfarth with violating the general theft of government property statute (18 U.S.C. § 641) in that he "willfully and knowingly convert[ed] to his own use and the use of another, and without authority convey[ed] and disposed of" information relating to the 10-PIGA procurement. Count II did not otherwise identify the information Wohlfarth allegedly converted. Counts III and IV charged illegal receipt of bribes (18 U.S.C. § 201).

On November 7, 1991, Petitioner moved to dismiss Count II of the indictment for failure to charge an offense and to suppress wire tapped conversations between the defendant and his wife. The district court held that Wohlfarth could be prosecuted under Section 641 even though the indictment did not identify the particular information Wohlfarth disclosed to Parkin. App. 17-19. The district court held also that the conversations could be admitted against Wohlfarth, even though the FBI agents who conducted the electronic surveillance had no prior evidence that the Wohlfarths were engaged in illegal activity, and even though the agents knew that the conversations they were intercepting were privileged. App. 17-19, 20-21.

After a three-day trial, the district court instructed the jury that the information that Wohlfarth allegedly converted was "procurement information pertaining to SSP's second-source contract for the 10-PIGA's." (C.A. App. 225). The district court rejected petitioner's request that the government identify the particular information Wohlfarth disclosed. The court instructed the jury that Wohlfarth could be convicted of violating Section 641 if he disclosed the information "without authority." (*Id.*). The district court told the jury that a disclosure of information is made "without authority" if:

> 1) Wohlfarth disclosed the information without first obtaining permission from the appropriate government official; or
>
> 2) the actual disclosure was made in a manner that violated government regulations authorizing or prohibiting the disclosure of the information.

(*Id.*).

The jury returned not guilty verdicts on Counts I (conspiracy to defraud) and Counts III and IV (the bribery counts). The jury found Wohlfarth guilty only on Count II, charging theft of government property. The district court sentenced Wohlfarth to a term of imprisonment of two years, all but four months suspended. The district court also fined

Wohlfarth $10,000. Wohlfarth currently is serving his sentence.

Court of Appeals Proceedings. The Fourth Circuit affirmed. The court held that the government need only have proved that the information disclosed related to the 10-PIGA procurement and that Petitioner had not secured authorization to make the disclosure. App. 13-14. The court held that information relating to the 10-PIGA procurement was by operation of law a thing of value, and that the government was not required to identify the information Petitioner disclosed or to prove that the government held a property interest in that information. *Id.* The issue before the jury, according to the court of appeals, "was not whether the information was procurement sensitive, or even whether appellant had released it." *Id.* The issue instead was merely whether Wohlfarth had released information relating to the 10-PIGA procurement prior to December 9, 1986 without the authority of his superiors. *Id.*

The court also held that the government agents had not violated the marital privilege when they monitored the Wohlfarths' telephone conversations, even though the government had no extrinsic evidence adequate to support a good faith belief that the Wohlfarths together were involved in criminal activity. The court held erroneously that Petitioner did "not contend that the excerpts of conversations played during the trial contained privileged communications." App. 14. The court also stated that Mrs. Wohlfarth was speaking as

Parkin's secretary during the taped conversations with her husband, not as Petitioner's wife. App. 15.

REASONS FOR GRANTING THE PETITION

Theft of government property. This case raises a question of substantial importance: to what extent can the executive branch criminalize the disclosure of government-held information? Historically, the government's efforts to prohibit the disclosure of information have been achieved through narrowly tailored statutes directed at particular classes or types of classified or sensitive information. *See, e.g.*, the Espionage Act, 18 U.S.C. § 792-798; the Atomic Energy Act, 42 U.S.C. §§ 2161-2166; the Intelligence Identities Protection Act of 1982, 50 U.S.C. §§ 421-426; the Arms Export Control Act, 22 U.S.C. §§ 2751-2796; and the National Security Act, 50 U.S.C. §§ 401-432.

Recently, however, the government has resorted to a decades-old statute, which was obviously not drafted to address these issues, to criminalize the disclosure of an increasingly broader body of government-held information. The government has used as its prosecutorial vehicle the theft of government property statute, 18 U.S.C. § 641. Yet Section 641 merely collected and codified various common law property theft crimes, none of which addressed theft of intangible information. *See Morissette v. United States*, 342 U.S. 246 (1952). The government nevertheless claims that government-held intangible information that merely relates to a governmental interest may constitute a "thing of

value" as that phrase is used in Section 641, even though the government holds no property interest in that information.

Since *Morissette*, the lower federal courts have adopted conflicting interpretations of the statute. The decision below exposes those conflicts.

The court's decision rested on three related components. First, the court below joined the Second, Fourth, and Sixth Circuits in holding that intangible as well as tangible property may constitute a "thing of value." The Ninth Circuit, however, has held repeatedly that intangible property may not constitute a "thing of value."

Having held that intangible information may constitute a "thing of value," the court next extended the statute further by holding that intangible information that merely relates to a governmental interest may constitute a "thing of value," even if the government holds no property interest in the information. Conversely, the Second, Fifth, Seventh, and Ninth Circuits have all held that only the property of the United States may constitute a "thing of value."

Finally, after removing most of the statute's traditional limitations, the court below was forced to place inordinate weight on the "without authority" clause. The court held that Section 641 prohibits the disclosure of information so long as an appropriate government official has not approved the disclosure. Yet this Court has held that a legislature may not

delegate that type of unfettered discretion to executive officers to enforce the nation's penal laws.

These conflicts are both significant and irreconcilable. Moreover, these conflicts will not be resolved without the intervention of this Court. These splits in the circuits have repeatedly been reinforced by the courts of appeals.

It also is important for this Court to resolve these issues now. The petition raises issues which recur with increasing frequency, for Section 641 has supplanted the narrowly tailored statutes as the statute of choice for prosecutors alleging theft of government-held intangible information.

Application of the marital privilege to electronic surveillance. The decision below raises an issue left open after *United States v. Zolin*, 491 U.S. 554 (1989). *Zolin* held that a district court may not conduct an *in camera* inspection of privileged materials to determine the application of the crime/fraud exception absent extrinsic evidence adequate to support "a good faith belief by a reasonable person" that an inspection may reveal evidence of criminal activity. *Id.* at 572.

The decision below permitted government agents knowingly to monitor privileged conversations even though the agents had no extrinsic evidence to support a good faith belief that Petitioner and his wife were together engaged in criminal activity. Under the Fourth Circuit's reasoning, the government is permitted to disregard

the applicable privilege and monitor privileged conversations in a search for potentially incriminating material. If the agents' search is successful, the conversations will be admitted at trial, for the participants will be accused of using the privilege to shield criminal activity. If the agents' search is unsuccessful, the government will not introduce the conversations at trial, not because they are privileged, but because the government did not find anything incriminating in the conversations. Vesting such discretion in the monitoring agents is contrary to the electronic surveillance statute and the Rules of Evidence.

The decision below thus grants to law enforcement officers a power that this Court has denied to the federal courts. Review by this Court is needed to resolve this important and recurring issue.

I. THIS CASE RAISES IMPORTANT QUESTIONS OF WHETHER SECTION 641 PROHIBITS THE UNAUTHORIZED DISCLOSURE OF INTANGIBLE INFORMATION THAT MERELY RELATES TO A GOVERNMENTAL INTEREST

In *Morissette*, this Court held that Section 641 collected and codified the common law property crimes of larceny, embezzlement, and conversion. 342 U.S. at 266-67. Because the statute codified the common law, this Court held that the statute carried a common law mens rea requirement and was not, as the government had argued, a strict liability statute. *Id.* at 272-73. Although *Morissette* held that Section 641 codified crimes then in existence, this Court had

no occasion similarly to make clear that the statute's phrase "thing of value" also was rooted in the common law. In the intervening forty years, the lower federal courts have adopted widely differing interpretations of what may constitute a "thing of value."

A. THIS CASE RAISES IMPORTANT QUESTIONS RELATING TO WHETHER INTANGIBLE INFORMATION IS A "THING OF VALUE" UNDER SECTION 641

The lower federal courts since *Morissette* have struggled with the question of whether information and other intangibles are a "thing of value" for purposes of Section 641. The courts have split two ways.

The Ninth Circuit has held that intangible property, such as information, is not a "thing of value" for purposes of Section 641. In *Chappell v. United States*, 270 F.2d 274 (9th Cir. 1959), the court reversed the conviction of an Air Force Master Sergeant who allegedly converted to his own use the services of an Airman under his supervision. The court held that intangible property such as the Airman's services could not constitute a "thing of value" under Section 641. *Id.* at 276.

The Ninth Circuit has repeatedly reaffirmed *Chappell*. In *United States v. Tobias*, 836 F.2d 449 (9th Cir.), *cert. denied*, 485 U.S. 991 (1988), the court again held that intangibles are not a "thing of value," stating that its interpretation of Section 641 "has the

advantage of avoiding the first amendment problems which might be caused by applying the terms of section 641 to intangible goods." *Id.* at 451. The court noted that two other circuits had disapproved of *Chappell*, but stated that it was "not persuaded" that it should reconsider its holding. Finally, just over a year ago the Ninth Circuit again reaffirmed *Chappell*. *See United States v. Hulberg*, 953 F.2d 1389 (table), *reported in full*, Nos. 90-50659, 91-50000, 1992 U.S. App. LEXIS 1564 (9th Cir. filed Feb. 4, 1992). The United States District Court for the District of Columbia has adopted the Ninth Circuit's holding in *Tobias*. *See United States v. Hubbard*, 474 F. Supp. 64, 80 (D.D.C. 1979)(prohibiting the government from relying "on any alleged conversion of government information for a violation of Section 641"). The Third Circuit has reserved decision on this issue. *See United States v. DiGilio*, 538 F.2d 972, 978 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

The Ninth Circuit rests its interpretation of Section 641 on the statute's common law history. As this Court held in *Morissette*, Section 641 codified and collected the common law crimes of larceny and embezzlement. 342 U.S. at 269 n.28. The Court concluded that Section 641 did not create new crimes, but merely codified those common law and closely related crimes already in existence. *Id.* In reciting the statute's legislative history, *Morissette* cited approvingly one court's conclusion that it could "apply the principles governing the common law crime of larceny" in interpreting the statute. *Id.* (quoting *United States v. Anderson*, 45 F. Supp. 943 (C.D. Cal. 1942)). Applying those principles, the

Ninth Circuit held in *Chappell* that Section 641 did not apply to the taking of intangible property because intangibles were not considered personal property at common law. *Chappell*, 270 F.2d at 277. Both larceny and conversion did not apply to the taking of intangibles at common law. *Id.*; 89 C.J.S. *Trover and Conversion* § 11 (1955).

Congress repeatedly has evidenced its intent and understanding that Section 641 does not apply to information and other intangibles. Consistent with *Chappell*, Congress has enacted a series of statutes that govern the disclosure or transfer of government-held information. The Espionage Act, 18 U.S.C. § 792-798; the Atomic Energy Act, 42 U.S.C. §§ 2161-2166; the Intelligence Identities Protection Act of 1982, 50 U.S.C. §§ 421-426; the Arms Export Control Act, 22 U.S.C. §§ 2751-2796; and the National Security Act, 50 U.S.C. §§ 401-432, all prohibit the disclosure or transfer of specific categories of information. Each was passed subsequent to the enactment of Section 641. And in enacting these statutes, Congress struck a delicate balance between protecting government-held information and vindicating first amendment freedoms. Applying Section 641 to the disclosure of information upsets that balance, for Section 641 would reach all of the conduct now regulated by these carefully drawn statutes, thereby rendering them superfluous. *See United States v. Truong Dinh Hung*, 629 F.2d 908, 926 (4th Cir. 1980)(opinion of Winter, J.)("If § 641 were extended to penalize the unauthorized disclosure of classified information, it

would greatly alter this meticulously woven fabric of criminal sanctions.")[2]

Three courts of appeals have rejected the Ninth Circuit's reasoning. The Second, Fourth, and Sixth Circuits have held that Section 641 applies to the conversion of intangible property. *See United States v. Girard*, 601 F.2d 69, 70-71 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979); *United States v. Fowler*, 932 F.2d 306, 309-310 (4th Cir. 1991); *United States v. Jeter*, 775 F.2d 670, 680 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986). Despite this Court's teaching in *Morissette*, these courts hold that Section 641 expanded upon the common law property theft crimes that it collected and codified.

B. THIS CASE RAISES IMPORTANT QUESTIONS AS TO WHETHER INFORMATION THAT MERELY RELATES TO A GOVERNMENTAL INTEREST MAY CONSTITUTE A "THING OF VALUE"

Having held that information and other intangibles may constitute a "thing of value," the court below extended Section 641 to reach the

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[2]That Congress has chosen to regulate the disclosure of government-held information through specific statutes is by itself reason to limit Section 641 to tangible property. As this Court has recognized, specific statutes regulating conduct supersede a general statute that could be construed to reach that same conduct. *Simpson v. United States*, 435 U.S. 6, 16 (1978)(terms of the more specific statute should be given precedence over the more general statute that governs the same conduct).

conversion of information that merely relates to a governmental interest, even if the government holds no property interest in that information. Specifically, the court held that information relating to the 10-PIGA procurement was, by operation of law, a "thing of value." App. 13-14. The court rejected Wohlfarth's argument that Section 641 required the government to identify the particular information relating to the procurement in which the government held a property interest. The court held:

> In the present case the [district] court instructed the jury that the procurement information pertained to the 10-PIGA contract, and that the government had to prove beyond a reasonable doubt that the appellant had conveyed information relating to this procurement without authority. The issue was not whether the information was procurement sensitive, or even whether appellant had released it. The issue for the jury was whether appellant had released this information prior to December 9, 1986.

App. 13-14.

The Fourth Circuit deems it irrelevant that a statute or regulation may not prohibit the disclosure of the particular information. *McAusland*, 979 F.2d at 975. It is enough that the information is in the government's files and that it relates to a governmental interest.

The decision below conflicts with the decisions of four other courts of appeals. Consistent with *Morissette*, the Second, Fifth, Seventh, and Ninth Circuits have held that only the *property* of the United States may constitute a "thing of value." *Girard*, 601 F.2d at 71 (2d Cir.)("the government has a property interest in certain of its private records which it may protect by statute as a thing of value."); *United States v. Gordon*, 638 F.2d 886, 889 (5th Cir.)("thing of value" refers to property of the United States), *cert. denied*, 452 U.S. 909 (1981); *United States v. Cotten*, 471 F.2d 744, 749 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973)(Section 641 is designed to protect the property of the United States); *United States v. Kristofic*, 847 F.2d 1295 (7th Cir. 1988)(defendant could not be convicted of violating Section 641 where thing allegedly converted was not the property of the United States).

These courts of appeals base their interpretation of the statute on its plain meaning. Section 641 prohibits the taking of a "thing of value of the United States." The plain meaning of the statute is that a "thing of value" refers to government property. *See Gordon*, 638 F.2d at 889; *see also Morissette*, 342 U.S. at 266 n.28 (Section 641 "renders one subject to its penalty who 'knowingly converts to his own use' property of the United States"). These courts adhere to the statute's plain meaning, as they must: "If the statute is clear and unambiguous 'that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress.'" *Sullivan v. Stroop*,

496 U.S. 478, 482 (1990)(quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988)).[3]

Limiting the definition of "thing of value" to government property is consistent not only with the language of Section 641 and the statute's common law foundations, but also with other federal statutes. For example, the Whistleblower Protection Act protects under certain circumstances government employees who disclose to the public information relating to government programs, contracts, or processes. Specifically, the Act protects from disciplinary action government employees who disclose information relating to a violation of law or to "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A). This information would undoubtedly be categorized as a thing of value under the Fourth Circuit's opinion here, and its disclosure as being without authority.

Applying Section 641 to such a disclosure would permit criminal prosecution of the government employee despite the obvious intent of the Whistleblower Protection Act. Information

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[3]These courts also base their interpretations on the statute's common law foundations. *See Kristofic*, 847 F.2d at 1297. The common law property crimes that Section 641 collected and codified protected an individual's personal property from theft. Section 641 extended this protection to the property of the United States. *See Cotten*, 471 F.2d at 749 ("This nation has a paramount interest in protecting its property . . . by assertion of its penal laws.").

relating to violation of law or gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety is by definition information relating to a governmental interest. The decision below thus would permit the government to circumvent the Whistleblower Protection Act's protections, for the Act does not protect government employees who are accused of committing or who are convicted of a federal felony. *See Gonzales v. Defense Logistics Agency*, 772 F.2d 887 (Fed. Cir. 1985); *see also* 5 U.S.C. § 7513.

The Fourth Circuit's interpretation wrenches the statute both from its plain meaning and from its common law moorings. The decision transforms Section 641 into a vehicle for suppressing the free speech rights of government employees. Furthermore, the statute, as the Fourth Circuit reads it, would seriously hinder the public's access to information necessary to evaluate the government and its internal processes.

C. THIS CASE RAISES IMPORTANT QUESTIONS AS TO WHETHER CONGRESS MAY DELEGATE TO EXECUTIVE BRANCH OFFICIALS UNFETTERED DISCRETION TO APPROVE DISCLOSURES OF INTANGIBLE INFORMATION

This Court repeatedly has struck down legislative enactments that grant to executive officials unfettered discretion to enforce the criminal laws. In

Lovell v. City of Griffin, 303 U.S. 444 (1938), this Court declared unconstitutional a municipal ordinance that forbade as a nuisance the distribution of literature without the prior approval of the city manager. The Court held that the first amendment prohibited that type of broad delegation to an executive official. Similarly, in *Niemotko v. Maryland*, 340 U.S. 268 (1951), this Court held that a statute granting to executive officials the discretion to deny city park permits was unconstitutional because it contained no "narrowly drawn, reasonable and definite standards for the officials to follow." *Id.* at 271. *See also United States v. Robel*, 389 U.S. 258, 274-75 (1967)(Brennan, J., concurring)("Congress ordinarily may delegate power under broad standards[; t]he area of permissible indefiniteness narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights. . .").

The decision below violates these principles. Having held that Section 641 applies to intangible information that merely relates to a governmental interest, the court below had to place inordinate weight on the statute's "without authority" clause for some limiting principle. The court held that the government need only prove that Wohlfarth disclosed information relating to the 10-PIGA procurement without authority. App. 13. The court's exclusive reliance on the "without authority" clause is unprecedented. No court has ever been compelled to place so much reliance on the "without authority" clause because no court has ever adopted such an expansive reading of Section 641.

The court below attempted to use the "without authority" clause to save the statute from impermissible vagueness. Without an authorization defense, the Fourth Circuit's interpretation would permit the government to prohibit the disclosure of all government-held information in any circumstance. Yet the court succeeded only in reaching the end it sought to avoid. The decision below transforms the statute into an expansive grant of authority to government officials to exercise a substantial restraint on the free speech rights of government employees. Indeed, the Fourth Circuit has held that an executive branch official may bar the disclosure of information merely on the basis of a long-standing agency practice. *McAusland*, 979 F.2d at 975.

The court's interpretation provides those officials with no "narrowly drawn, reasonable and definite standards" to apply in enforcing the statute. Indeed, the Fourth Circuit's decisions permit a government official to prohibit the disclosure of information solely on the basis of a "long-standing agency practice." *McAusland*, 979 F.2d at 975. The officials thus are left to use their own judgment in determining which disclosures are wrongful and which disclosures should be prosecuted.[4] Such an

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[4]The decision below confirms the fears of Judge Winter, who worried that "the vagueness of the 'without authority' standard could pose a serious threat to public debate of national issues, thereby bringing the constitutional validity of § 641 into question because of its chilling effect on the exercise of first amendment

interpretation confers on executive department officials "'a virtually unrestrained power to arrest and charge persons with a violation' of the [statute and] is unconstitutional because '[t]he opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.'" *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987)(O'Conner, J.)(quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 135-36 (1974)).

II. THIS CASE RAISES IMPORTANT ISSUES RELATING TO WHETHER LAW ENFORCEMENT OFFICERS MAY KNOWINGLY MONITOR PRIVILEGED CONVERSATIONS ABSENT EXTRINSIC EVIDENCE ADEQUATE TO SUPPORT A GOOD FAITH BELIEF THAT THE PARTICIPANTS ARE TOGETHER INVOLVED IN ILLEGAL ACTIVITY

The decision below raises an issue left open after *United States v. Zolin*, 491 U.S. 554 (1989). *Zolin* held that a federal court may not conduct an *in camera* inspection of privileged materials to determine the application of the crime/fraud exception absent extrinsic evidence adequate to

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rights." *Truoung Dinh Hung*, 629 F.2d at 925 (opinion of Winter, J.). Judge Winter noted that "[u]nder § 641 as it is written, no precise standard controls the exercise of discretion by upper level government employees when they decide whether to forbid or permit the disclosure of government information. *Id.* Thus, "upper level government employees might use their discretion in an arbitrary fashion to prevent the disclosure of government information." *Id.*

support "a good faith belief by a reasonable person" that an inspection may reveal evidence of criminal activity. *Id.* at 572 (quoting *Caldwell v. District Ct.*, 644 P.2d 26, 33 (Colo. 1982)). This Court stated that "a district court would be mistaken if it reviewed documents *in camera* solely 'because the government beg[ged it]' to do so, 'with no reason to suspect crime or fraud.'" *Id.* at 571. The decision below raises the question as to whether law enforcement officers may do what the federal courts may not; namely, inspect privileged materials for evidence of crime absent extrinsic evidence adequate to support a good faith belief that the participants are together involved in criminal activity.

Here, the government clearly lacked any such good faith belief prior to monitoring the Wohlfarths' telephone conversations. The first wiretap authorization order was signed on January 16, 1987. (C.A. App. 332). In the first conversation monitored on January 23, 1987, Petitioner began the conversation by saying, "Greetings, wife." (C.A. App. 287, 338). Despite this immediate and obvious identification of the parties as husband and wife, the government agents continued to monitor the Wohlfarths' conversations as they discussed their car problems, their bills, their house repairs, their sex life, problems in their relationship, their finances, and even their bathroom habits. This Court consistently has held that these types of private marital communications are entitled to the same type of protection as attorney-client communications. *See Trammel v. United States*, 445 U.S. 40, 51 (1980)(information privately disclosed between a

husband and wife is "'the best solace of human existence'")(citation omitted); *Blau v. United States*, 340 U.S. 332 (1951).

The first reference to Mr. Wohlfarth in any affidavit supporting an electronic surveillance order was in the June 3, 1987 affidavit. By that time, the government had monitored the Wohlfarths' conversations for five months, and, by its own account, listened in on scores of conversations between the Wohlfarths. Many of these calls were played for the jury.

Despite the government's flagrant disregard of the privileged status of the conversations between the Wohlfarths, the court of appeals affirmed the district court's rejection of Wohlfarth's motion to suppress the privileged conversations. (App. 14-15). The court of appeals' sole reason for doing so was its persistence in ignoring the plain record -- its assertion that Wohlfarth did not claim that the conversations admitted at trial were privileged. (*Id.* at 14). Yet Wohlfarth did claim that the admitted conversations were privileged.[5] Indeed, Wohlfarth

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[5]Petitioner objected to the introduction of the privileged communications immediately prior to trial so as to preserve the argument for a possible appeal:

> THE COURT: Swear the jury.
> (Whereupon, the jury panel was duly sworn.)
> THE COURT: Counsel approach the Bench.
> (Whereupon, a conference was held at the Bench with Court and counsel, out of hearing of the jury, and reported as follows:)

explicitly had informed the court of appeals that "Wohlfarth contend[ed] on appeal as he did in the trial court that all the conversations between the Wohlfarths were privileged and should never have been intercepted." (Wohlfarth C.A. Rep. Br. 23).

The decision below imperils the legitimacy of all privileges in the electronic surveillance context, for it permits government agents to disregard the applicable privilege.[6] The decision would, for

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> THE COURT: There is a motion in limine. The Government says they are not going to talk about the polygraph. They do intend to play the tape. I expect that tape is arguably in furtherance of the conspiracy. I will allow it to be played.
>
> MR. EGGLESTON: Your Honor, just one other matter, since we are dealing with evidentiary things. I made a pretrial motion to suppress the tapes as being taken illegally under the wiretap statute. That was denied. I would now or at some other time make a motion to exclude them as to the marital privilege, which is arguably a slightly different ground.
>
> THE COURT: Wasn't that made previously also?
>
> MR. EGGLESTON: As I reviewed my papers, I think it was. I wanted to make sure I haven't waived it.
>
> THE COURT: I thought it was. I thought I saw it in the file.
>
> MR. ARONICA: We believe it was.

See App. 20-21.

[6]The wiretap statute, 18 U.S.C. § 2517(4), provides in pertinent part:

> (4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in

example, allow federal agents to monitor an attorney-client communication. If the government subsequently discovers evidence that the participants are involved in criminal activity, the government would be permitted to override the privilege and introduce the communications at trial. If the government does not find such evidence of criminality, the government would not introduce the communications at trial, not because the communications are privileged, but merely because the government found no incriminating evidence. This permits the government to do what *Zolin* prohibited: to disregard the privileged status of a communication even though the government has no extrinsic evidence adequate to support a good faith belief that the participants are together involved in criminal activity.

The decision below is without precedent. Prior to the decisions of the court of appeals and district court below, no court had ever held that the government could reserve to itself the power to decide whether to listen to privileged conversations. *See, e.g., United States v. DePalma*, 461 F. Supp. 800, 821 (S.D.N.Y. 1978)(barring government from admitting marital conversations where it offered no evidence showing that "at the time of the intercepts" the agents believed the participants were involved in any criminal activity); *United States v. Shakur*, 560 F.

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violation of, the provisions of this chapter shall lose its privileged character.

Supp. 318, 326 (S.D.N.Y. 1983)(stating that the court would grant a motion to suppress privileged conversations where government agents monitored attorney-client communications absent extrinsic evidence to show that the participants were involved in criminal activity).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

W. Neil Eggleston
Counsel of Record
Leiv H. Blad Jr.
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1299 Pennsylvania Ave., N.W.
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(202) 783-0800

April 1993

APPENDICES

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT M. WOHLFARTH,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria,
Albert V. Bryan, Jr., Senior District Judge.
(CR-91-402-A)
Argued: October 29, 1992
Decided: January 26, 1993

Before MURNAGHAN and NIEMEYER, Circuit Judges, and CHAPMAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: W. Neil Eggleston, HOWREY & SIMON, Washington, D.C. for Appellant. Jack I. Hanly, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. **ON BRIEF:** Leiv H. Blad, Jr., HOWREY

& SIMON, Washington, D.C. for Appellant. Richard Cullen, United States Attorney, Joseph J. Aronica, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

OPINION

PER CURIAM:

Robert M. Wohlfarth appeals from a judgment of conviction following a jury trial in which he was found guilty on Count 2 of a four count indictment. This count charged him with converting or conveying without authority a thing of the United States having a value in excess of $100 in violation of 18 U.S.C. § 641 (1976). He was acquitted on a conspiracy count and on two bribery counts in the same indictment. He seeks reversal and claims (1) that § 641 does not apply to the disclosure of information in this case; (2) that the evidence was not sufficient to convict him under the statute; (3) that the court improperly admitted third party testimony as to the state of his mind; and (4) that the court improperly admitted wiretaps that contained conversations protected by the marital communications privilege.

After a careful consideration of the briefs and oral arguments and a thorough examination of the record, we find no error and we affirm.

I.

Wohlfarth is a patent attorney, who worked for the United States Navy in its Strategic Systems Program (SSP). Among his duties was the determination of various patent clauses to be used in procurement contracts. Appellant's wife was the secretary to William Parkin, a private consultant, who advised defense contractors on ways of obtaining Navy contracts. Parkin had formerly worked as a Navy procurement officer. The Navy became suspicious that Parkin was obtaining inside procurement information and a wiretap was placed on his telephone after a proper court order had been obtained. This wiretap revealed that the appellant was involved in furnishing procurement information to Parkin prior to the award of contracts.

The procurement leading to the indictment was the purchase of the Pendulous Integrated Gyroscopic Accelerometers, known as 10-PIGA, for Trident submarines. The Navy had been obtaining this equipment from Honeywell, and it wished to obtain a second source by use of a competitive procurement. Wohlfarth decided upon the patent clauses to be used in the procurement and in August 1986, SSP issued a Request for Proposals to the industry.

On November 3, 1986, several companies, including Litton Bendix, Rockwell, Ferrente, and Northrop, submitted proposals. These proposals

were considered by the government's Technical Proposal Evaluation Panel (TPEP) and the Navy contracting officers.

Prior to the award of a contract, government employees are not to release information as to a contractor's bid either to other contractors or to the public. SSP had a standard practice of not releasing the price of any bid prior to the award of a competitive contract, and 48 C.F.R. §§ 5.401 and 15.413-1 (1991), prohibit the release of price information during the procurement process.

Following the award of a contract, a losing company is entitled to be debriefed by procurement officers so as to learn where their proposals were weak. However, the procurement officers are not authorized to tell a losing company the prices proposed by other losing companies or the evaluation scores and rankings of the proposals that have been made by TPEP.

After the 10-PIGA procurement process had begun, but before any proposals had been submitted, Wohlfarth contacted Northrop's vice president for business development, Robert Ziernicki, and suggested that he hire William Parkin to assist in the procurement. Parkin was retained by Northrop to obtain procurement information, and shortly before the award of the 10-PIGA contract, Parkin contacted Northrop's marketing representative, Sigurski, and

using information furnished by Wohlfarth,[1] advised Sigurski that Northrop was about to lose the bid to Litton. Parkin provided the bid prices of all competitors and even related Northrop's bid price, a figure that Sigurski did not previously have. Ziernicki and Sigurski testified that during their 10 years and 25 years, respectively, of seeking procurement contracts, they had never before received competitors' prices during the procurement competition.

Parkin advised Sigurski that if Northrop wished to get back into the competition it must immediately send a telegram to SSP stating that its bid was in error and then it must submit a revised bid lower than Litton's. Northrop officials met and determined that they could not reduce their bid by a sufficient amount to compete with the existing Litton proposal, and Parkin was advised that Northrop would not make another bid.

Thereafter, Northrop asked Parkin for a written report on the procurement procedure and Parkin obtained from Wohlfarth the price figures of each bidder, the evaluation rankings and scores of the various bids and other source selection information. This information was included in the final written report to Northrop. Parkin was paid $12,500 by Northrop for his services.

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[1]Both Parkin and Wohlfarth testified that this information was not furnished until after the date the contract had been awarded, but there was evidence from which the jury could conclude that such information was passed before such award.

It was the government's contention that Wohlfarth provided the procurement sensitive information to Parkin on or before December 4, 1986, approximately five days before the contract was awarded or announced.

Wohlfarth testified that he had not disclosed any of the price figures to Parkin prior to the award of the 10-PIGA contract, because he knew that such a disclosure was prohibited. Wohlfarth stated that he had told Parkin that Litton had won the contract only after this had been confirmed by the commander of SSP, and he had not spoken with the commander until December 9 or 10, 1986, after the award of the contract. The appellant testified that he had learned the pricing and evaluation scores from listening to conversations at SSP after the award of the contract. He admitted that he had prepared a written report for Parkin to send to Northrop which included this information, but this was after the contract had been awarded. The prices submitted by Litton in its bid were clearly information covered by 48 C.F.R. § 15.413-1(a) and should not have been revealed to Parkin or to Northrop employees. The bid of Litton was "received in confidence from an offeror," it was marked "Source Selection Sensitive for Official Use Only" and was not to be released. See 16 C.F.R. § 5.401(b)(2).[2]

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2 48 C.F.R. § 5.401 (1986)

5.401 General.

II.

Wohlfarth argues that the § 641 does not apply because *United States v. Lambert*, 446 F. Supp. 890 (D. Conn. 1978), *aff'd sub nom., United States v. Girard*, 601 F.2d 69 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979), held that 18 U.S.C. § 641 does not apply to the

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(a) A high level of business security must be maintained in order to preserve the integrity of the acquisition process. When it is necessary to obtain information from potential contractors and others outside the Government for use in preparing Government estimates, contracting officers shall ensure that the information is not publicized or discussed with potential contractors.

(b) Contracting officers may make available maximum information to the public, except information --

(1) On plans that would provide undue or discriminatory advantage to private or personal interests;

(2) Received in confidence from an offeror;

(3) Otherwise requiring protection under Freedom of Information Act (see subpart 24.2) or Privacy Act (see subpart 24.1); or

(4) Pertaining to internal agency communications (e.g., technical reviews, contracting authority or other reasons, or recommendations referring thereto).

(c) This policy applies to all Government personnel who participate directly or indirectly in any stage of the acquisition cycle.

disclosure of government information unless such disclosure is prohibited by statute or regulation. This argument is unpersuasive. First, the FARs are regulations that clearly seek to protect the government's interests during the procurement process by preventing the premature release of confidential pricing information. Second, *Lambert* is not as restrictive as appellant would have us believe. It holds "the jury may consider only transfers of information affirmatively prohibited by other federal statutes, administrative rules and regulations, or, perhaps long standing government practices." 446 F. Supp. at 899.

The evidence established not only the language and clear intent of the FARs, but also the longstanding government practice of keeping bid information confidential during the procurement process so as to protect the government from collusive bidding. The information alleged to have been disclosed by Wohlfarth was clearly within the reach of 18 U.S.C. § 641. The FARs prohibited his disclosing Litton's bid price to Parkin, the evidence established SSP's practice of prohibiting disclosure of such information, and Wohlfarth testified that he was aware that he was not authorized to disclose this information prior to the award of the contract. We held in *United States v. Fowler*, 932 F.2d 306, 310 (4th Cir. 1991), that "§ 641 would apply because information is a species of property and a thing of value." The information as to competitive bids is a thing of considerable value to the United States and to competing companies. This information is

protected by regulations and by longstanding government practice and 18 U.S.C. § 641 applies.

III.

Appellant challenges the sufficiency of the evidence to sustain his conviction. He argues that the government's case "was animated by a single theory: that on December 4, 1986, Wohlfarth disclosed procurement sensitive information to Parkin, who then relayed that information to Northrop officials." He then attacks this theory with the argument that the evidence was undisputed that he was not in Washington during the entire week of December 1, 1986, and he had no access to nor the ability to disclose the information.

The evidence does reflect that Wohlfarth was working at a Navy installation in San Jose, California from Monday, December 1, 1986 through Friday, December 5, 1986.

Wohlfarth also argues that the government's witness Parkin testified that Wohlfarth had only disclosed to him the facts that Litton had won the contract and that the contract would be awarded without conducting a BAFO (best and final offer) and that this information was not disclosed by Wohlfarth to Parkin until after the award of the 10-PIGA contract had been announced. Therefore, the information was no longer procurement sensitive.

In *United States v. Tresvant*, 677 F.2d 1018 (4th Cir. 1982), we set forth the principles that control when we review a claim of insufficiency of the evidence:

> The guidelines for reviewing the sufficiency of evidence to support a conviction are quite familiar. The relevant question is not whether the appellate court is convinced of guilt beyond a reasonable doubt, but rather whether, viewing the evidence in the light most favorable to the government, *any* rational trier of facts could have found the defendant guilty beyond a reasonable doubt. *United States v. Shaver*, 651 F.2d 236, 238 (4th Cir. 1981), *citing Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *United States v. Sherman*, 421 F.2d 198, 199-200 (4th Cir.), *cert. denied*, 398 U.S. 914, 90 S. Ct. 1717, 26 L. Ed. 2d 78 (1970). We must consider circumstantial as well as direct evidence, and allow the government the benefit of all reasonable inferences from the facts proven to those sought to be established. *Holloway v. McElroy*, 632 F.2d 605, 641 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981); *United States v. Grow*, 394 F.2d 182, 201 (4th Cir.), *cert. denied*, 393 U.S. 840, 89 S. Ct. 118, 21 L. Ed. 2d 111 (1968). Where there are conflicts in the testimony, it is for the jury and not the appellate court to weigh the evidence and judge the credibility of the witnesses. *United States v. Fisher*, 484 F.2d 868, 869-70 (4th Cir. 1973), *cert. denied*, 415 U.S. 924, 94 S. Ct. 1428, 39 L. Ed. 2d 480 (1974). (Emphasis in original.)

Id. at 1021.

Applying these principles to the evidence in the record, we find that there was sufficient evidence to support the verdict of guilty as to Count 2.

The government's position was that the procurement sensitive information was disclosed by Wohlfarth to Parkin, and the passed by Parkin to Sigurski of Northrop, and that this disclosure occurred prior to December 9, 1986, the date of the announcement of the 10-PIGA contract award. The date of the unauthorized disclosure as alleged in the indictment to be "on or about December 4, 1986."

Sigurski testified that prior to the award of the contract, Parkin called him and advised that the bid was accelerated and was to be awarded without the usual BAFO. Parkin also told Sigurski the amount of Litton's bid and the amount of Northrop's bid (a figure of which Sigurski was unaware, even though he was an employee of Northrop). Parkin advised that if Northrop wanted to stay in the bidding, it must immediately wire SSP that there had been an error in its bid and ask for additional time to submit a new or corrected bid, which must be lower than Litton's bid of approximately $22 million. Sigurski passed this information on to other Northrop officials. He testified that the following day Parkin called to find out if Northrop was going to make another bid, and Sigurski advised that there had been no decision. A day or so later, still prior to the award of the contract, Sigurski advised Parkin that

Northrop would not submit a new bid, because it could not reduce its price sufficiently to be competitive with Litton.

Parkin testified that all information he disclosed to Sigurski about the 10-PIGA procurement had come from Wohlfarth, but that this information had not been given to Sigurski prior to the award of the contract. After the contract had been awarded, Parkin made a written report to Northrop explaining what had happened in the procurement. This report contained the price figures of all five bidders, and Wohlfarth admitted that he furnished this information to Parkin, but he claimed that this occurred only after the contract had been awarded and the material was no longer procurement sensitive. A jury may believe a part of a witness' testimony and disbelieve the remainder. It could believe Parkin's and Wohlfarth's testimony as to the type of information conveyed but disbelieve them as to the date. Sigurski's testimony was sufficient to establish the date of December 4, 1986.

Although Wohlfarth was not in his Washington office during the week of December 1, 1986, this would not foreclose a jury from finding that he had access to the information at an earlier date or that he received the information by telephone while he was in California and passed it along to Parkin. Contracting officer Wright testified that the pricing information was on his desk in November 1986 and that Wohlfarth could have seen it then. Wohlfarth could have learned of the bid prices from general conversations at SSP, because he testified that

this is how he obtained the pricing and evaluation data after his return from California.

The testimony was clear that Northrop had the procurement sensitive information several days prior to the award of the contract. Sigurski testified that this information came to him from Parkin and from no other. Parkin testified that his information about 10-PIGA came only from Wohlfarth, although Parkin denied receipt of this information prior to December 9, 1986. There was ample proof that procurement sensitive information was released by Wohlfarth, and there was sufficient circumstantial evidence for a jury to find that it was released by appellant on or about December 4, 1986.

IV.

We find no merit to appellant's exceptions relating to the jury instructions. First, he complains that the judge instructed the jury that the information contained in Count 2 of the indictment was a thing of value that could be converted or conveyed without authority. He asserts that this was an issue that should have been left to the jury. In *United States v. Fowler, supra,* we held that § 641 applied to information because it is property and a thing of value. In the present case the court instructed the jury that the procurement information pertained to the 10-PIGA contract, and that the government had to prove beyond a reasonable doubt that the appellant had conveyed information relating to this procurement without authority. The issue

was not whether the information was procurement sensitive, or even whether appellant had released it. The issue for the jury was whether appellant had released this information prior to December 9, 1986. The jury was properly instructed on the essential elements of the crime.

Appellant also contends that the court erred in declining to give a good faith instruction, but this was not necessary. The court instructed the jury that the defendant had to act knowingly and willfully, and there was no contention by either party that Wohlfarth acted in good faith in releasing the information prior to the date of the contract award. Wohlfarth testified that he did not release it prior to this date, so good faith is not relevant.

V.

Appellant contends that the court-approved wiretap contained marital communication between himself and his wife and that these communications were privileged. However, he does not contend that the excerpts of conversations played during the trial contained privileged communications, but argues that the government's failure to minimize the interception of some of the privileged communications during the course of the wiretaps required suppression of all of the recorded conversations between Mr. and Mrs. Wohlfarth. The district court conducted a hearing as to how the wiretap interceptions were conducted and what efforts were made to minimize the interception of

communications not subject to the court order. We find no abuse of discretion by the district court in the admission of the taped conversations which were played for the jury, and we find no abuse of discretion in the district court's refusal to suppress all the conversations between the Wohlfarths. It must be remembered that although these were conversations between husband and wife, Mrs. Wohlfarth was employed as Parkin's secretary, and was, on the occasions used at trial, conversing with Wohlfarth as Parkin's secretary and not as Wohlfarth's wife.

VI.

Appellant claims error in the admission of contracting officer Wright's testimony relating to standard practices of SSP in not disclosing competitor's prices to other competitors or to the public prior to the award of a contract, in not disclosing the evaluation scores and bids of losing companies after the award of a contract, and Wright's opinion that Wohlfarth would have known of these practices. Appellant contends that this is mere speculation and violates Federal Rule of Evidence 701 because it does not represent the witness' perception. A review of Wright's testimony clearly establishes that his opinion was based on his perceptions. He had been employed in Naval procurement with SSP for more than 15 years. He was familiar with the 10-PIGA procurement, the competitive procedures used by SSP and the standard practices used to protect the integrity of the procurement process. He was also familiar with the

work normally done by the appellant and had worked with him on the 10-PIGA procurement. Based on this knowledge, Wright had a rational basis for his opinion that Wohlfarth knew of the standard practice not to release information regarding bid prices prior to the award of the contract.

For the reasons set forth above, the judgment of conviction is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA)		
	)	
v.	)	Criminal No.
	)	91-402-A
	)	
ROBERT M. WOHLFARTH	)	

ORDER

This matter came before the Court on a number of motions by the defendant and one motion by the government.

For the reasons stated from the bench:

1. Defendant's Motion for Production of Agent's Rough Notes of Interview should be, and hereby is, **DENIED AS MOOT**.

2. Defendant's Motion to Compel Government to Elect Between Counts 3 and 4 should be, and hereby is, **DENIED**.

3. Defendant's Motion to Dismiss Counts 3 and 4 for Failure to State Bribery Offenses should be, and hereby is, **DENIED**, without prejudice to

defendant's later renewal of the motion at trial, if appropriate.

4. Defendant's Motion to Suppress Wiretap Conversations should be, and hereby is, **DENIED**. Defendant has leave to renew this motion as to any particular conversations that fail to meet the minimization requirements and impermissibly intrude upon the marital privilege.

5. Defendant's Motion to Suppress Statements Because of Misrepresentations should be, and hereby is, **DENIED**.

6. Defendant's Motion to Compel the Government to Produce Exculpatory Evidence should be, and hereby is, **DENIED AS MOOT**.

7. Defendant's Motion to Dismiss Count 1 as Duplicitous should be, and hereby is, **DENIED**.

8. Defendant's Motion to Dismiss Count 2 Charging Conversion should be, and hereby is, **DENIED**.

9. Defendant's Motion to Dismiss Indictment for Grand Jury Abuse should be, and hereby is, **DENIED**.

10. Government's Motion for Pretrial Ruling that Adequate Foundation Exists for Admission Into Evidence of Certain Recordings and

Related Pen Register Information should be, and hereby is, **DENIED AS MOOT**.

The Clerk is directed to send copies of this Order to all counsel of record.

T. S. Ellis, III
United States District Judge

Alexandria, Virginia
December 6, 1991

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA)		
	)	
v.	)	Criminal No.
	)	91-402-A
	)	
ROBERT M. WOHLFARTH	)	

EXCERPT FROM COURT PROCEEDINGS,
January 6, 1992 (Page 17, line 1 to Page 17, line24):

THE COURT: Swear the jury.

(Whereupon, the jury panel was duly sworn.)

THE COURT: Counsel approach the Bench.

(Whereupon, a conference was held at the Bench with Court and counsel, out of hearing of the jury, and reported as follows:)

THE COURT: There is a motion in limine. The Government says they are not going to talk about the polygraph. They do intend to play the tape. I expect that tape is arguably in furtherance of the conspiracy. I will allow it to be played.

MR. EGGLESTON: Your Honor, just one other matter, since we are dealing with evidentiary things. I made a pretrial motion to suppress the tapes as being taken illegally under the wiretap statute. That was denied. I would now or at some other time make a motion to exclude them as to the marital privilege, which is arguably a slightly different ground.

THE COURT: Wasn't that made previously also?

MR. EGGLESTON: As I reviewed my papers, I think it was. I wanted to make sure I haven't waived it.

THE COURT: I thought it was. I thought I saw it in the file.

MR. ARONICA: We believe it was.

(2)

Supreme
FILED
JUN 30 1993
OFFICE OF THE CLERK

No. 92-1710

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT M. WOHLFARTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 641 prohibits the unauthorized disclosure of confidential government information generated in connection with a competitive defense procurement.

2. Whether wiretap evidence involving conversations between petitioner and his wife should have been suppressed when the conversations did not contain privileged communications.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is not reported, but the judgment is noted at 985 F.2d 554 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1993. The petition for a writ of certiorari was filed on April 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of theft of government property, in violation of 18 U.S.C. 641.[1] He was sentenced to two years' imprisonment, all but four months of which were suspended in favor of probation, and was fined $10,000. The court of appeals affirmed. Pet. App. 1-16.

1. The evidence at trial showed that petitioner, a patent attorney for the United States Navy's Strategic Systems Program Office (SSP), revealed confidential information on bids for a Navy procurement contract to the Northrop Corporation. Two Federal Acquisition Regulations (FARs), 48 C.F.R. 5.401 and 15.413-1, prohibit government employees from releasing price information during the procurement process. SSP also has a standard practice not to release the price of any bid before award of a contract. Once a contract is awarded, procurement officers may inform a losing bidder about the weak points in the company's bid, but procurement officers may not tell a losing bidder the prices proposed by other losing companies or the evaluation scores and rankings assigned to the competing proposals by a Technical Proposal Evaluation Panel. Pet. App. 3-4.

In 1986 SSP was purchasing Pendulous Integrated Gyroscopic Accelerometers, known as 10-PIGAs, for Trident submarines from Honeywell. The Navy decided to obtain a second source for those items through a competitive procurement. Petitioner was responsible for determining the patent clauses to be used in the contract expected to result from the bidding competition. Pet. App. 3.

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[1] He was acquitted of conspiring to defraud the United States (18 U.S.C. 371) and two counts of receiving bribes (18 U.S.C. 201). Pet. App. 2.

In August 1986, SSP issued a request for proposals to the industry. In November 1986, Northrop and three competitors submitted proposals. The government's Technical Proposal Evaluation Panel reviewed the technical portions of the bids, while the contracting officer and his negotiator reviewed the cost or price portions of the proposals. Pet. App. 3-4; Gov't C.A. Br. 3-4.

After the 10-PIGA procurement process had begun, but before any proposals were submitted, petitioner contacted Robert Ziernicki, Northrop's vice-president for business development, and suggested that Ziernicki hire William Parkin to assist in the procurement. Parkin, a former Navy procurement officer, was a private consultant who advised defense contractors on how to obtain Navy contracts. Petitioner's wife was also Parkin's secretary. Northrop hired Parkin to obtain procurement information. Pet. App. 3-4. Parkin informed petitioner that Northrop had hired him. Gov't C.A. Br. 6.

Shortly before the 10-PIGA contract was awarded, Parkin contacted Mark Sigurski, Northrop's vice-president for business development, and provided him with information that Parkin had obtained from petitioner. Parkin reported that Northrop was about to lose the bid to Litton. Parkin also provided Northrop's bid price and the prices submitted by its competitors. Sigurski and Ziernicki later testified that in their 25 and 10 years' experience, respectively, of seeking procurement contracts, they had never before received competitors' prices during the procurement competition. Pet. App. 4-5; Gov't C.A. Br. 6.

Although Northrop declined Parkin's suggestion to submit a new bid in order to get back into the competition, Northrop asked Parkin for a written report on the procurement procedure. Parkin in turn asked petitioner for the necessary information for that report.

Petitioner provided not only the price figures for each competitor, but also the technical evaluation rankings and scores and other source selection information. Parkin finalized the report and gave it to Northrop. He received $12,500 from Northrop for his work for the company. Pet. App. 5.

2. On appeal, petitioner argued that 18 U.S.C. 641 does not apply to the disclosure of government information unless the disclosure is prohibited by statute or regulation. The court of appeals held that the FARs clearly prohibited disclosure, as did the longstanding government practice of keeping price information confidential. The court also noted that petitioner had acknowledged that he was not authorized tc disclose the information before the contract's award. Accordingly, the court held that the information disclosed by petitioner "was clearly within the reach of 18 U.S.C. § 641." Pet. App. 8. The court also held that the competitive bid information had "considerable value to the United States and to competing companies." *Ibid.*

The court of appeals also rejected petitioner's challenge to the admission of certain wiretap evidence. Although petitioner did not contend that any conversation played at trial involved privileged communications, he argued that the government's failure to minimize conversations between him and his wife required suppression of all the wiretaps. The court of appeals held that the district court did not abuse its discretion in finding that the government had taken adequate steps to minimize the interception of privileged conversations. In any event, the court of appeals noted that the conversations played at trial involved petitioner's wife in her role as Parkin's secretary and thus

did not involve privileged marital communications.[2] Pet. App. 14-15.

ARGUMENT

1. Petitioner contends (Pet. 12-23) that Section 641 does not apply to intangible information because it is not a "thing of value" that can be converted within the meaning of the statute. He also argues that the courts of appeals are divided on this question. Those contentions lack merit and do not warrant review.[3]

a. Section 641 punishes the knowing conversion of any "thing of value" of the United States. 18 U.S.C. 641. The phrase "thing of value" readily encompasses intangible property, such as confidential information. That interpretation accords with the statute's purpose to provide comprehensive protection to the government's property rights. As this Court has noted, "[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Morissette* v. *United States*, 342 U.S. 246, 269 n.28 (1952); see also *Bell* v. *United States*, 462 U.S. 356, 360 (1983) (the phrase "thing of value" in 18 U.S.C.

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[2] The court of appeals also rejected petitioner's arguments that the evidence was insufficient to support his conviction, that the trial court's instructions to the jury were flawed, and that certain testimony was improperly admitted. Pet. App. 9-15. Petitioner does not renew those claims in this Court.

[3] The Court recently denied certiorari in a case raising the same claims, *United States* v. *McAusland*, 979 F.2d 970 (4th Cir. 1992), cert. denied, 113 S. Ct. 1642 (1993), and there is no reason for a different result here.

2113(b) encompasses intangible property and "is thus broader than common law larceny").[4]

There is no merit to petitioner's claim (Pet. 20-23) that the court of appeals' decision impermissibly delegates to individual Executive Branch officials the determination of when information has been conveyed "without authority." Petitioner relies on cases in which the Court determined that a government official was given too much discretion in determining whether conduct was criminal. See, *e.g.*, *Lovell* v. *City of Griffin*, 303 U.S. 444, 451-452 (1938) (stating that making the distribution of literature a nuisance unless approved by the city manager violates the First Amendment); *Niemotko* v. *Maryland*, 340 U.S. 268, 271-272 (1951) (absence of standards in ordinance that allows city officials to deny park permits violates the First Amendment). In this case, however, petitioner's liability rests on violations of published regulations and established agency practice, not on a single official's discretionary decision. Con-

[4] Petitioner contends (Pet. 16-20) that the court of appeals extended Section 641 to encompass procurement information in which the government lacks a property interest. The court of appeals did not so hold. To the contrary, it stated, in reliance on *United States* v. *Fowler*, 932 F.2d 306 (4th Cir. 1991), that Section 641 applies to government information because "information is a species of property and a thing of value." Pet. App. 8. There is no doubt that the government has a property interest in confidential pricing information relating to an ongoing procurement. *Ibid.*; see *Carpenter* v. *United States*, 484 U.S. 19, 26 (1987) ("[c]onfidential business information has long been recognized as property"). Accordingly, this case presents no conflict with the decisions that petitioner characterizes (Pet. 18) as holding that "only the *property* of the United States may constitute a 'thing of value.'" And, in any event, petitioner did not argue in the court of appeals that confidential information is not a "thing of value" under Section 641, and he is precluded from raising that claim here for the first time. See Pet. C.A. Br. 16-32.

trary to petitioner's suggestion (Pet. 22), the court of appeals did not hold that individual officials possess unguided discretion to determine "which disclosures are wrongful and which disclosures should be prosecuted." Rather, the court specifically noted (Pet. App. 8) that the proof of petitioner's lack of authority to release the information rested on the FARs that specifically prohibited disclosure, on the SSP's longstanding practice to forbid such disclosure prior to the award of a contract, and on petitioner's own acknowledgement that he was prohibited from disclosing price information before a contract was awarded.[5]

b. The courts of appeals have repeatedly upheld convictions under Section 641 for the wrongful acquisition or dissemination of government information. See *United States* v. *Fowler*, 932 F.2d 306, 309-310 (4th Cir. 1991) (upholding Section 641 conviction of a defendant who misused information obtained from copies of classified documents; court rejected the argument that information in a document is not a "thing of value" under Section 641); *United States* v. *Barger*, 931 F.2d 359, 368-369 (6th Cir. 1991) (upholding Section 641 conviction of a defendant who obtained a DEA manual relating to a rival motorcycle gang; "[c]learly, the value of the * * * manual is in the information contained

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[5] For example, 48 C.F.R. 5.401(b) provides that "[c]ontracting officers may make available maximum information to the public, *except information*—* * * (2) [r]*eceived in confidence from an offeror*" (emphasis added). Subsection (c) of that regulation states that it applies to "all Government personnel who participate directly or indirectly in any stage of the acquisition cycle." Similarly, FAR 15.413-1(a) prohibits release of the information contained in a proposal after its receipt by the government. 48 C.F.R. 15.413-1(a). Moreover, Litton's contract proposal was marked "Source Selection Sensitive for Official Use Only," and petitioner therefore knew that it was not to be released. Pet. App. 6.

therein" and that is "enough to meet the property or 'thing of value' element of the statute"); *United States* v. *Jeter*, 775 F.2d 670, 679-682 (6th Cir. 1985) (upholding Section 641 conviction of defendant who illegally obtained and distributed carbon copies of secret grand jury documents and proceedings; court noted that "Congress' very use of the more expansive 'thing of value' rather than 'property' strongly implies coverage beyond mere tangible entities"), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Girard*, 601 F.2d 69, 70-71 (2d Cir.) (upholding conviction of a former DEA agent who obtained and distributed confidential law enforcement records; "[a]lthough the content of a writing is intangible, it is nonetheless a thing of value"), cert. denied, 444 U.S. 871 (1979).

Petitioner argues (Pet. 13-14) that the Ninth Circuit has rejected the application of Section 641 to government information. The cases cited by petitioner, however, did not require the Ninth Circuit squarely to consider whether Section 641 covers the conversion of government information. In *Chappell* v. *United States*, 270 F.2d 274 (9th Cir. 1959), an Air Force sergeant was prosecuted for converting to his own use the services and labor of an airman who was ordered to paint private apartments that the sergeant owned. Based on its analysis of the common law tort of conversion, the court of appeals concluded that the airman's "services and labor" were not a "thing of value" under Section 641. 270 F.2d at 276-278. In *United States* v. *Tobias*, 836 F.2d 449, 451 (9th Cir.), cert. denied, 485 U.S. 991 (1988), the court indicated that Section 641 does not apply to "intangible goods" such as "classified information." That statement, however, was dictum, because the court held that the cryptographic cards that the defendant had converted in that case constituted "tangible property." 836 F.2d at 452. Accordingly, *Chappell* and *Tobias* did not deal with

claimed appropriations of government information and do not conflict with the court of appeals' decision in this case.[6]

In any event, the application of Section 641 to the conduct involved in this case does not present an issue of continuing importance. In 1988, Congress enacted the Office of Federal Procurement Policy Act Amendments, Pub. L. No. 100-679, § 6, 102 Stat. 4063 (Procurement Integrity Act), codified at 41 U.S.C. 423 (Supp. III 1991). That Act specifically prohibits an officer or employee of a federal agency involved in a procurement application from disclosing "directly or indirectly, to any competing contractor or any officer, employee, representative, agent or consultant of a competing contractor any proprietary or source selection information" regarding a procurement. 41 U.S.C. 423(j)(2) (Supp. III 1991). Section 423(p)(6) defines "proprietary information" to include both "information contained in a bid or proposal" and "cost or pricing data." Section 423(p)(7) defines "source selection information" as *inter alia* "information determined by the head of the agency or the contracting officer to be information * * * the disclosure of which to a competing contractor would jeopardize the integrity or successful completion of the procurement concerned" and that is required to be kept secure in order to prevent disclosure. Because in future cases government employees like petitioner can be prosecuted under the Procurement Integrity Act for revealing information to a bidder about its competitors' bids and the government's

[6] Petitioner also relies (Pet. 14) on *United States* v. *Hulberg*, 953 F.2d 1389 (9th Cir. 1992) (Table). Quite apart from the fact that that decision is not published and does not constitute precedent in the Ninth Circuit, see 9th Cir. Local R. 36-3, it is distinguishable. *Hulberg* upheld a conviction under Section 641 for appropriating stolen government photocopies; it did not to involve a conviction for appropriating information.

internal procurement processes, there is no need for this Court to consider the question whether the same conduct would independently violate Section 641.

2. Petitioner also contends (Pet. 23-28) that wiretapped conversations between himself and his wife, intercepted over Parkin's telephone, should not have been introduced into evidence. Petitioner asserts that, before the interceptions were made, the government had no good faith basis to suspect him and his wife of complicity in criminal activity. The courts below correctly rejected that factbound claim, and further review is not warranted.

When petitioner moved to suppress the wiretap evidence prior to trial, the district court reviewed the intercepted conversations and found that the government had not engaged in a pattern of intercepting privileged calls. Gov't C.A. Br. 32. That finding rested in part on an FBI agent's affidavit that before any conversations between petitioner and his wife were intercepted, petitioner had been identified as a Navy employee who was passing procurement information to Parkin and that petitioner's wife worked as Parkin's secretary. *Id.* at 33. The agent also advised the court that monitoring agents were directed to minimize privileged spousal communications, but that when petitioner's wife was acting as Parkin's secretary, her conversations were not privileged.[7] *Ibid.*

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[7] The agent further summarized the monitoring and, where applicable, the efforts at minimization of the intercepted conversations between petitioner and his wife. Gov't C.A. Br. 34. The agent's affidavit showed that 160 calls were intercepted between petitioner and his wife in the 14 months that the wiretaps were in place. Of those calls, 59 were minimized within the first 30 seconds, and another 20 within the first minute. Of the calls that were not minimized, 26 were less than 30 seconds in length, and 16 were concluded in less than a minute. *Ibid.*

Contrary to petitioner's claim, the government had a good faith basis for intercepting the conversations between petitioner and his wife when she was working at Parkin's office. First, the government had reason to believe that petitioner was passing confidential procurement information to Parkin. Second, since petitioner's wife was working as Parkin's secretary, she was functioning in that role, rather than in the role of petitioner's spouse, when she took his calls at Parkin's office. Pet. App. 15. Petitioner's reliance on *United States* v. *DePalma*, 461 F. Supp. 800, 821 (S.D.N.Y. 1978), and *United States* v. *Shakur*, 560 F. Supp. 318, 326 (S.D. N.Y. 1983), is misplaced. Those cases state only that the government should terminate its interception of privileged communications once it realizes that the parties are engaged in such communications. Nothing in those cases suggests that the government may not continue to listen to conversations that do not implicate the privilege or that involve criminal activity.

Petitioner is not helped by his reliance (Pet. 23-24) on *United States* v. *Zolin*, 491 U.S. 554 (1989). In that case, the Court stated that, when the government requests a trial court to review allegedly privileged materials in camera to determine the applicability of the crime-fraud exception to the attorney-client privilege, the government must make "a showing of a factual basis adequate to support a good faith belief by a reasonable person" that the review may disclose evidence indicating that the exception applies. *Id.* at 572. The Court noted that trial courts have flexibility in determining whether to conduct an in camera review and that the "threshold" for doing so "need not be a stringent one." *Ibid. Zolin* did not concern the threshold showing for engaging in electronic surveillance of arguably privileged communications. Even if its "good faith belief" standard were applicable in this context, however, the facts

support the legitimacy of the government's actions, as discussed above.

In any event, none of the conversations introduced into evidence involved any arguably privileged communications. Pet. App. 14. Instead, in the conversations introduced at trial petitioner periodically asked his wife whether Northrop had paid Parkin, and petitioner complained that he wanted his money from Parkin. Gov't C.A. Br. 36 n.11. As such, petitioner has no grounds for complaint about the wiretap evidence that was introduced at trial.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] See *United States* v. *Cox*, 462 F.2d 1293, 1301 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974); see also *United States* v. *Hoffman*, 832 F.2d 1299, 1309 (1st Cir. 1987); *United States* v. *McGuinness*, 764 F. Supp. 888, 900-901 (S.D.N.Y. 1991); *United States* v. *Shakur*, 560 F. Supp. at 326. Cf. *Scott* v. *United States*, 436 U.S. 128, 135 n.10 (1978) (noting, but not reaching, the argument that the wiretap statute "requires suppression of only those conversations which were illegally intercepted, not suppression of all the intercepted conversations").

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government does not justify the decision below, but runs from it, ultimately missing the important doctrinal issues present here. In its cursory opposition, the government simply has not offered any reason sufficient to rebut Petitioner's claim that the issues posed fully merit this Court's review. The petition therefore should be granted.

THE THEFT OF GOVERNMENT PROPERTY ISSUE MERITS REVIEW

1. The government's opposition misstates the holding of the court below. The court below held that Section 641 did not obligate the government to identify the information Petitioner allegedly disclosed; that the government need only have proved that the information related to the 10-PIGA procurement; that all the information relating to the procurement was by operation of law a "thing of value"; and that Petitioner had to obtain the permission of an executive branch official before disclosing any information relating to the procurement.

The government instead improperly attempts to limit the holding below. The government argues that the court held merely that information relating to bid prices could be a thing of value, that Petitioner disclosed bid prices, and that the jury therefore was entitled to find Petitioner guilty of violating Section 641.

The government's opposition misses the point. Neither the indictment nor the jury instructions identified the information allegedly disclosed. Both instead advised the jury that *any* information relating to the 10-PIGA procurement was *by operation of law* a "thing of value." (App. 13-14). It thus is impossible for this Court to determine what information the jury convicted Petitioner of disclosing.

By ignoring the holding of the Court below, the government attempts to will away the important issue this petition presents. If Section 641 is to apply to information that merely relates to a government procurement, a jury would be entitled to convict a defendant of disclosing information in which the government holds no property interest. By adopting this rule, the Fourth Circuit placed itself squarely in conflict with the Second, Fifth, Seventh, and Ninth Circuits, all of which have held that only the property of the United States may constitute a "thing of value" for purposes of Section 641. (*See* Pet. 16-19). This Court should resolve this important conflict in the circuits.

The government's opposition also ignores other issues posed by the decision below. For example, the government does not respond to and apparently does not contest that that the decision below conflicts with the statute's common law underpinnings. (*See* Pet. at 14-15, 19 n.3). As a codification of the common law, Section 641 cannot extend beyond the common law definitional boundaries present at the time Section 641 was enacted. Plainly, at that time Section 641 did not address the conversion of information. The government's attempt to apply Section 641 to alleged wrongdoing not covered by the language of the statute should be rejected.[1] The government also

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[1] The government erroneously refers to the allegedly broad purpose and reach of Section 641. (Govt. Opp. 5, 6, 7). For example, the government states that Section 641 was intended to "provide comprehensive protection to the government's property

has no response to Petitioner's argument that the numerous statutes specifically governing the disclosure of government-held information evidence Congress' intent and understanding that, consistent with the common law, Section 641 does not apply to information and other intangibles. (*See* Pet. 15-16). Finally, the government ignores Petitioner's argument that the decision below throws Section 641 into conflict with the Whistle Blower Protection Act. (*See* Pet. 19-20).

Petitioner argued that the decision below conflicts with the Ninth Circuit's holding that information and other intangibles cannot be a "thing of value" for purposes of Section 641. (*See* Pet. 13-16). Even though the Ninth Circuit has three times held that intangibles are not "things of value" for purposes of Section 641, the government argues that "[t]he cases cited by petitioner . . . did not require the Ninth Circuit squarely to consider whether Section 641 covers the conversion of government information." (Govt. Opp. 8). The government's response is unavailing. Information has always been classified as an intangible. *See, e.g., Carpenter v. United States*, 484 U.S. 19, 25 (1987)(confidential business information is an intangible). This Court need not wait for the Ninth Circuit to express the obvious -- that information is an intangible. The

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rights." (*Id.* at 5). The government offers no support for its sweeping assertion, and Petitioner knows of none. *See Morissette v. United States*, 342 U.S. 246, 266-67 (1952)(Section 641 merely codified the common law property crimes then in existence).

decision below poses a clear conflict in the circuits, and the government has offered no reason to conclude otherwise.[2]

Finally, the government asserts that this case is of no continuing importance because Congress has enacted the Procurement Integrity Act. (Govt. Opp. 9-10). The government is wrong. This case presents an issue of paramount importance -- the extent to which the government can criminalize the disclosure of government-held, intangible information that merely relates to a governmental interest. The decision below represents a dangerous extension of a statute which already has become the prosecutor's statute of choice. This issue transcends the government-contract context generally or the Procurement Integrity Act specifically, and fully merits this Court's review.

THE COURT'S ELECTRONIC SURVEILLANCE RULING ALSO DESERVES REVIEW

2. The government's opposition also establishes that this Court must resolve the doctrinal

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[2] The government argues that Petitioner waived this argument because he did not raise it in the court of appeals. The government is wrong. Petitioner argued in the court below that Section 641 did not apply to this case. (*See* Pet. C.A. Br. 16-28). Moreover, Petitioner was effectively precluded from arguing in the court of appeals specifically that information is not a "thing of value" because the court twice recently had held that information could constitute a "thing of value." *See United States v. McAusland*, 979 F.2d 970 (4th Cir. 1992), *cert. denied*, ___ U.S. ___ (1993); *United States v. Fowler*, 932 F.2d 306 (4th Cir. 1991).

conflicts relating to the electronic surveillance of privileged communications. Consistent with the fourth amendment, the electronic surveillance statute requires that a surveillance warrant identify the person, location, and type of communications that the government will intercept. 18 U.S.C. §§ 2518(4)(a)-(c).[3] The statute prohibits the government from abrogating the particular privileges: "[n]o otherwise privileged wire, oral, or electronic communications intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." 18 U.S.C. § 2517(4). The statute also requires that law enforcement officials conduct the surveillance "in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. § 2518(4).

The government argues that the minimization requirement permits it to do what the statute says it cannot -- abrogate the privilege. The

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3 Section 2518 provides in pertinent part:

Each order authorizing or approving the interception of any wire, or oral, or electronic comunication . . . shall specify --

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates.

government argues that the statute entitles it to "continue to listen to conversations that do not implicate the privilege or that involve criminal activity." (*Id.* at 10). Under the government's interpretation, a conversation would not "implicate the privilege" if the surveillance of the otherwise privileged conversation revealed evidence of criminal activity, even if, as here, the conversants are not identified in the warrant and even if there is no extrinsic evidence supporting a good faith belief that the conversants are together involved in criminal activity. (*Id.* at 10).[4]

Under this interpretation, the fourth amendment provides almost no protection to privileged oral conversations that are subject to an electronic search and seizure and certainly far less protection than is afforded to privileged documents. *See* M. Goldsmith & K. Balmforth, *The Electronic Surveillance of Privileged Communications: A Conflict of Doctrines*, 64 S. CAL. L. REV. 903 (1991). The government could not, for example, conduct an indiscriminate search of documents contained in an attorney's office, reading each document, stopping only when the search of the privileged document

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4 As stated *infra*, the government misstates the scope of the marital privilege. The government is entitled to determine whether particular conversations "implicate the privilege" in the attorney client context, where the privilege protects only those communications whose purpose is to seek or obtain legal advice. 8 J. WIGMORE, EVIDENCE § 2292 (McNaughton rev. ed. 1961). But the government cannot make that same determination in the marital privilege context because the marital privilege protects all private marital communications. *Id.* at § 2336.

revealed no evidence of criminal activity. *See Klitzman, Klitzman and Gallagher v. Krut*, 744 F.2d 955 (3d Cir. 1984)(warrant was overbroad that allowed the search and seizure of all of a law "firm's financial records, file lists, and appointment books, regardless of whether those documents were connected in any way to the . . . files sought by the grand jury"). Yet the government asserts that the surveillance statute permits it to seize oral communications in precisely that fashion.

If the government is correct, it possesses the power to disregard the privilege. If the government's electronic surveillance unearths evidence of criminal activity, the government argues that it is entitled to use that evidence at trial, regardless of whether the evidence was privileged at the time the government made the decision to monitor the conversation. This position simply cannot be correct, for it gives to prosecutors a power that this Court has denied to impartial federal judges. *See United States v. Zolin*, 491 U.S. 554 (1989)(district court may not conduct an *in camera* inspection of privileged materials to determine applicability of crime/fraud exception absent extrinsic evidence supporting good faith belief by a reasonable person that inspection may reveal evidence of criminal activity).

The government's opposition fails completely to address these doctrinal problems. The government instead offers a series of arguments that rest on inaccurate legal and factual premises. First, the government claims that "petitioner did not contend that any conversation played at trial

involved privileged communications." (Govt. Opp. 4). The government simply misstates the scope of the marital privilege. Petitioner claimed in the district court (App. 20-21) and in the court below (Pet. C.A. Rep. Br. 23) that the marital conversations intercepted by the government were privileged and should have been suppressed. The marital privilege applied to all of the monitored conversations between the Wohlfarths, for the privilege applies to any private, marital communication. 8 J. WIGMORE, EVIDENCE § 2336 (McNaughton rev. ed. 1961). Petitioner's objection that the conversations were privileged did not apply only to a few, but to all of the surveilled conversations between Petitioner and his wife. Moreover, as stated in the petition (*see* Pet. 25-26), Petitioner did object at trial to the introduction of the marital communications on the grounds of privilege, and the government acknowledged at trial that this issue had been preserved. (App. 20-21).

Second, the government wrongly argues that it "had a good faith basis for intercepting the conversations between petitioner and his wife." (Govt. Opp. 11). The first wiretap order in the district court was signed on January 16, 1987. (Pet. C.A. Br. 40). The named interceptees were Parkin and others. Neither Petitioner nor his wife were listed as a named interceptee, nor was there any showing in the government's supporting affidavit of any probable cause to believe that the Wohlfarths may have engaged in criminal activities. (*Id.*). Government agents nevertheless intercepted five privileged marital communications before the agents even mentioned the Wohlfarths in their supporting

affidavit on February 13, 1987. (C.A. App. 287). Only after reviewing these and subsequent privileged conversations did the government assert probable cause to believe that the Wohlfarths were together involved in criminal activity.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[5] In its February 13, 1987 extension order, the district court only found "some cause," not probably cause, to believe that the Wohlfarths were engaged in criminal activity. The government did not allege probable cause to believe the Wohlfarths were engaged in criminal activity until June 3, 1987. (Pet. C.A. Br. 41). Yet by that time the government had for five months listened to scores of conversations between the Wohlfarths. (*Id.*; C.A. App. 336). Only after the government had listened to these marital communications did it allege probable cause to believe the Wohlfarths were engaged in criminal activity. And it wrongly made that determination on the basis of the wrongly intercepted conversations, not on the basis of extrinsic evidence. *See Zolin*, 491 U.S. at 572.